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IN THE

United States Supreme Court

OCTOBER TERM 1982

CABLEVISION SYSTEMS DEVELOPMENT COMPANY and ATLANTIC CABLE TELEVISION SERVICES CORPORATION,

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 25

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

Whether an integrated cable television company which had previously subcontracted two of its many services, and which subsequently terminated the subcontracting relationship and hired the subcontractor's employees, can be deemed a successor to the subcontractor, obliging it to bargain with the union that represented the subcontractor's employees, where the integrated cable television company and the subcontractor are in different industries.

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Petitioners, Cablevision Systems Development Company and Atlantic Cable Television Services Corporation, pray that a writ of certiorari issue to review the judgment entered in this case on March 2, 1982, by the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the Court of Appeals which enforced the order of the National Labor Relations Board is officially reported at 671 F.2d 737 (2nd Cir. 1982) and is printed along with the order denying the petition for rehearing in the Appendix to this petition. For ready reference, both the decision and order of the National Labor Relations Board, and the decision of the Administrative Law Judge which it adopts are printed in the Appendix to this petition.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit denied the petition for rehearing on April 19, 1982. This petition is being filed within 90 days thereof. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976).

Statute Involved

The relevant statute is Sec. 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §§158(a)(1) and (5), which states:

> Sec. 8(a) It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

Statement of the Case

This case comes to this Court following the enforcement by the Court of Appeals for the Second Circuit of an order of the National Labor Relations Board (Board) rendered on August 27, 1980 which adopted the recommended order of the Administrative Law Judge requiring Petitioners to bargain collectively with Local 25, International Brotherhood of Electrical Workers, AFL-CIO.

The Second Circuit agreed with the Board that Petitioners were a successor to Broadway Maintenance Corporation because a majority of the employees in the bargaining unit at Broadway were employed by Petitioners and performing essentially the same duties.

Statement of the Facts

Cablevision Systems Development Company (Cablevision) operated a fully integrated cable television company when in 1974 it contracted out to the alleged predecessor Broadway Maintenance Corporation (Broadway) the installation and service technician functions. These were just two of the numerous functions performed by a cable television company. Broadway was not a cable television company. Indeed, it refused to undertake all of the functions required to construct and operate a cable television system. It provided to cable television companies on a contracting-out basis these two functions. Practically all the other operations were performed by Cablevision's own employees.

In June of 1977 Cablevision terminated the Broadway contracting-out relationship and brought these functions in-house, altering and revising them so as to integrate them with the overall operations of the company. A subsidiary of Cablevision, Atlantic Cable Television Services Corporation (Atlantic Cable) was organized for the purpose of delivering all engineering services to Cablevision, including the two that had been performed by Broadway on a contracting-out basis. Atlantic Cable operates as the engineering department of Cablevision.

The Proceedings Below

A. The Decision of the National Labor Relations Board

The National Labor Relations Board found that the majority of employees of Atlantic Cable when it commenced operations were former Broadway employees and that they performed the same jobs for Atlantic Cable as they had formerly for Broadway. Accordingly, the National Labor Relations Board found that Atlantic Cable was the successor to Broadway and had the obligation to bargain with the union that had represented Broadway's employees.

B. The Decision of the Court of Appeals

The Court of Appeals enforced the order of the National Labor Relations Board, rejecting Petitioners' argument that they were not a successor because they were in a different industry than the claimed predecessor. It accepted the Board's findings that the majority of the employees in an appropriate bargaining unit within the petitioner Atlantic Cable came over from the predecessor and continued to perform essentially the same duties. This fact, rather than the differences between the companies, was found determinative by the Second Circuit relying upon the statement in *IUE* v. *NLRB*, 604 F.2d 689, 694 (D.C. Cir. 1979) that the "essential inquiry is whether operations, as they impinge on union members, remaining essentially the same after the transfer." However, the Court in *IUE* v. *NLRB*, stated immediately preceding the quoted language that "some internal organization alterations may affect successorship obligations," citing *International Ass'n of Machinists* v. *NLRB*, 414 F.2d 1135, 1137, 1138 (D.C. Cir. 1969).

The Second Circuit failed to acknowledge that such basic "differences in the enterprises operated" override the continuation of the same basic tasks after the change as the employees had performed for the predecessor. That failure accounts for the Court's citation of *Saks & Co.* v. *NLRB*, 634 F.2d 681, 686 (2d Cir. 1980) to support the successorship bargaining obligations where a majority of the successor's employees was taken over from the predecessor. In fact, the Court reached that conclusion in *Saks* because the predecessor and successor "are both retail department stores" and therefore "clearly distinguishable from *Bausch & Lomb*", 526 F.2d 817 (2d Cir. 1975), where the firms involved were in "completely different industr[ies]." See *infra*. page 6.

REASONS FOR GRANTING THE WRIT

A serious conflict exists between this decision of the United States Court of Appeals for the Second Circuit and the decision of this Court in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972) and its progeny, with respect to the application of the successorship doctrine to a situation where the claimed successor is in an industry different from the claimed predecessor.

Relying on this Court's decision in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 278-279 (1972), the Second Circuit focused only on the similarity of duties performed by the employees for the predecessor and successor. In doing so, it overlooked the critical successorship requirement emphasized by this Court in *Burns*, that both firms operate in the same industry.

This requirement was not overlooked by the Court of Appeals for the District of Columbia in *International Ass'n of Machinists* v. *NLRB*, *supra*.

In that case the Court noted that automobile dealerships which hired the employees of a discontinued dealership, were not successors because "of differences in the enterprises operated" by the alleged predecessor and successor. There was a lack of identity in the operational aspects of the two companies. It was not argued that there was any change in the duties of the service department employees when they moved from the terminated dealership to the alleged successor automobile dealerships, and the Court therefore noted that the finding of no successorship did *not* turn on the composition of the unit, the consideration found determinative by the Second Circuit in the instant case.

The Court of Appeals for the First Circuit has acknowledged the correctness of *International Ass'n of Machinists* in *NLRB* v. *Middleboro Fire Apparatus, Inc.*, 590 F.2d 4 (1st Cir. 1978). Moreover, the Court of Appeals for the Fifth Circuit

in *NLRB* v. *Alamo White Truck Service*, 273 F.2d 238 (5th Cir. 1959) noted that there is no successorship obligation where the nature of the employing enterprise changes.

Indeed the Second Circuit in the instant case failed to follow its own decision in *NLRB* v. *Bausch & Lomb, Inc.*, 526 F.2d 817 (2d Cir. 1975). There, the Court held that a successorship obligation to bargain would not arise from the employment by a new owner of a building of boiler men who had worked for the previous owner. The Court noted that while all buildings require a heating function—as all integrated cable television companies require the two functions performed by the petitioners' predecessor—"greater continuity of operations" is required for successorship.

It is important that this Court reaffirm the successorship doctrine in order to preclude its application where the claimed successor and predecessor are in different industries. This requirement, formulated by this Court in *Burns*, has been adhered to by other federal courts of appeals and has been followed on a previous occasion by the Second Circuit. There is no reason for the Second Circuit to have abandoned this requirement in this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: Mineola, New York
July, 1982

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